LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
DEC 29 1964
JOHN F. DAVIS, CLERK

NO. 326

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

THE AMERICAN SHIP BUILDING COMPANY,
Petitioner
v.
NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE

J. ALBERT WOLL
General Counsel, AFL-CIO
ROBERT C. MAYER
THEODORE J. ST. ANTOINE
736 Bowen Building
815 Fifteenth Street, N. W.
Washington, D.C. 20005
THOMAS E. HARRIS
Associate General Counsel, AFL-CIO
815 Sixteenth Street, N. W.
Washington, D.C. 20006

INDEX

	Page
Argument	1
I. The Lockout as an Offensive Weapon in Bargaining Violates the Act	3
II. The Lockout is Not the Corollary of the Strike as Respects the Functioning of Collective Bargaining	5
III. The Lockout is not the Corollary of the Strike as Respects the Language or Over-all Plan of the Act	15
Conclusion	20

CITATIONS

CASES:

American Steel Foundaries v. *Tri-City Central Trades Council*, 257 U.S. 184	5
Betts Cadillac Olds, Inc., 96 NLRB 268	9
Bldg. Contractors Assn., 138 NLRB 1405	9
Division 1287, Amalgamated Assn. v. *Missouri*, 374 U.S. 74	5
Duluth Bottling Assn., 48 NLRB 1335	9, 16
Electrical Workers Local No. 761 v. *NLRB*, 366 U.S. 667	4
International Union, Etc. v. *O'Brien*, 339 U.S. 454	16
NLRB v. *Crompton-Highland Mills, Inc.*, 337 U.S. 217	6
NLRB v. *Erie Resistor Corp.*, 373 U.S. 221	4, 5, 7, 8, 13
NLRB v. *Fansteel Metallurgical Corp.*, 306 U.S. 240	16
NLRB v. *Mackay Radio & Tel. Co.*, 304 U.S. 333	4, 6, 8, 11, 12
NLRB v. *Insurance Agents Int. Union*, 361 U.S. 477	8, 14
NLRB v. *International Rice Milling Co.*, 341 U.S. 665	4
NLRB v. *Truck Drivers Local 449*, 353 U.S. 87	2, 4, 7, 8, 9, 16, 18, 19
United Steelworkers v. *NLRB*, 376 U.S. 492	4

MISCELLANEOUS:

Meltzer, *Lockouts Under the LMRA: New Shadows of an Old Terrain*, 28 U. Chic. L. Rev. 614	11
Millis and Montgomery, *Organized Labor* (1945)	6, 12, 15
Webster's Third New International Dictionary	3

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

NO. 255

THE AMERICAN SHIP BUILDING COMPANY,
Petitioner
v.
NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE

This brief *amicus curiae* is filed by the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) with the consent of the parties, as provided for in Rule 42 of the Rules of this Court.

ARGUMENT

The National Labor Relations Board found that the company, the petitioner here, could not reasonably have feared that the union intended to strike, and that its lockout of its employees was accordingly not legally permissible as a defensive measure to prevent customers' ships from being tied up in the company's shipyard (J.A. 293-296). The Board found, contrariwise, that the company locked out its employees "as an offensive weapon intended to force the abandonment of the union's contract demands and the

acceptance of the employer's" (J.A. 295-296). Hence the Board held, under long settled doctrine, that the lockout violated Section 8(a)(1) and (3) of the Act.

The Board's findings as to the reason for the lockout were sustained by the Court of Appeals, and this Court declined to review that aspect of the case. Under the limited grant of certiorari the question before the Court, as stated in the petition for certiorari, is:

> "Whether, under Section 8(d)(4), the 1947 Amendment to the National Labor Relations Act, an employer lockout is a corollary of the employees' statutory right to strike?"

However, Section 8(d (4) deals only with the 60 day notice requirement, before strike or lockout, where a collective bargaining agreement is in effect. There is no contention that the company violated § 8(d)(4). Its lockout of its employees was held invalid, rather, under § 8(a)(1) and (3).

Presumably the company means to argue, by its phrasing of the question in the petition for certiorari, that § 8(d)(4) implies that the lockout, like the strike, may be legal in some circumstances. Granting that, § 8(b)(4) still does not so much as intimate that the lockout is the corollary of the strike, so that the one is legally permissible wherever the other would be.

However, we take it that the Court wishes to consider in this case the broad issue it noted and reserved in *NLRB* v. *Truck Drivers Local 449*, 353 U.S. 87, footnote 19):

> "We thus find it unnecessary to pass upon the question whether, as a general proposition, the employer lockout is the corollary of the employees' statutory right to strike."

We submit that the employer lockout is not in any sense the corollary of the employees' statutory right to strike. We will discuss the issue from two different standpoints:

(1) whether, from the standpoint of the functioning of the collective bargaining process, the right to lockout is the corollary of the right to strike, and (2) whether, as a legal matter, the right to lockout is the corollary of the right to strike, under the language and over-all plan of the Act.

Petitioner argues the former point (Br. pp. 12-18), but not the latter. Instead petitioner simply contends that the use of the lockout as an offensive weapon in collective bargaining should not be held to violate the Act. We will discuss this contention briefly before examining the relationship between strike and lockout.

I

The Lockout as an Offensive Weapon in Bargaining Violates the Act

It is quite clear that a lockout of the sort involved in this case, *i.e.*, the shutdown of operations by an employer in order to win concessions from the employees in collecting bargaining, does literally violate the Act.[1]

Section 7 provides that employees shall have the right to join unions, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities (*i.e.*, to strike). It also provides that they have the right to refrain from such activities. Section 8(a) (1) makes it an unfair labor practice for an employer to "interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7."

It can hardly be doubted that the lockout of employees—their temporary layoff—as a weapon in collective bargaining does interfere with, restrain and coerce employees in

---

[1] Webster's Third New International Dictionary defines "lockout" as "the withholding of employment by an employer and the whole or partial closing of his business establishment in order to gain concessions from employees."

the exercise of their right to engage in collective bargaining. An anticipatory lockout likewise interferes with the right of employees to strike, and even more with their right to refrain from striking.

Again, § 8(a)(3) makes it an unfair labor practice for an employer to discourage membership in a union by discrimination in regard to "tenure of employment or any term or condition of employment." A lockout, by laying off employees, discriminates in regard to "tenure of employment"; and it can hardly be doubted that it discourages union membership. Cf. *NLRB* v. *Erie Resistor Corp.*, 373 U.S. 221.

Petitioner argues that the use of the lockout as a weapon in collective bargaining is no more violative of the Act than the lockout in defense of a multi-employer bargaining unit, sanctioned in *NLRB* v. *Truck Drivers Local 449*, 353 U.S. 87; and, further, that the lockout is a weapon of less virulence than the hiring of strikebreakers, sanctioned in *NLRB* v. *Mackay Radio & Tel. Co.*, 304 U.S. 333.

This is the same line of argument that was rejected by the Court in *NLRB* v. *Erie Resistor Corp.*, 373 U.S. 221.

The fact that the Board, or this Court, holds that a certain type of conduct was not meant to be banned by the Act, even though literally within its general proscriptions, does not mean that those proscriptions may not embrace other types of conduct. Compare *NLRB* v. *International Rice Milling Co.*, 341 U.S. 665, and *United Steelworkers* v. *NLRB*, 376 U.S 492, with *Electrical Workers Local No. 761* v. *NLRB*, 366 U.S. 667. The question, rather, is whether the Board exceeded its wide range of discretion in "the balancing of conflicting legitimate interests" *(Truck Drivers Local 449*, 353 U.S. at 96) in concluding that the damage done to collective bargaining and industrial peace by use of the lockout as a weapon in collective bargaining outweighs the employer's interest in self-help. To that issue we now turn.

II

The Lockout is Not the Corollary of the Strike as Respects the Functioning of Collective Bargaining

The lockout is not the corollary of the strike, either literally or in substance, from the standpoint of its relation to the collective bargaining process.

1. Viewing the matter literally, the right to lockout is the right to close the plant. However, the right to strike, is not, to our regret, the right to close the plant, since the employer has the legal right to continue to operate in the face of a strike, either with supervisors or with strike-breakers. Literally, the corollary of the right to strike is the right to break a strike; and the employees have no right which is the corollary of the lockout.

2. More important, the strike and the lockout are not comparable as regards their respective relationships to collective bargaining.

The right to strike is indispensible to the employees' collective bargaining power.

> "This repeated solicitude [i.e., of the Congress] for the right to strike is predicated upon the conclusion that a strike when legitimately employed is an economic weapon which in great measure implements and supports the principles of the collective bargaining system." *NLRB* v. *Erie Resistor Corporation*, 373 U.S. 221, 233-234.[2]

> "Collective bargaining, with the right to strike at its core, is the essence of the federal scheme." *Division 1287, Amalgamated Assn.* v. *Missouri*, 374 U.S. 74, 82.

The right to lockout is not comparably indispensible to

---

[2] At this point the Court quoted at length, in a footnote, from the well known opinion of Chief Justice Taft in *American Steel Foundaries* v. *Tri-City Central Trades Council*, 257 U.S. 184, 209.

employer bargaining power, for the reason that an employer has other powerful weapons in bargaining, quite apart from the lockout. In the usual situation, where the employees are seeking improvements in wages, hours or working conditions, the employer can simply refuse to make any changes in the status quo.[3] If the employees strike, the employer is free to replace them permanently with new employees who do accept the existing working conditions. *NLRB* v. *Mackay R. & Tel. Co.*, 304 U.S. 333. An employer is even free unilaterally to put into effect proposals he has made to the union, and which have been rejected by the union, once an impasse has been reached in bargaining with the union. *NLRB* v. *Crompton-Highland Mills, Inc.*, 337 U.S. 217. In that situation, too, the employer is free to replace employees who refuse to work on the new terms.

Thus an employer's ability effectively to press his collective bargaining proposals is not dependent upon his having the right to lockout his employees, as the employees' ability to press their proposals is dependent upon their having the right to strike.

Facile assertions that the strike and the lockout are "countervailing weapons" (Petitioner's Br. p. 13) overlook these fundamental differences in the legal rights and economic power of employers and employees. Nor is it true that use of the lockout, like use of the strike, "is well recognized and accepted." *(Id.)* As establishing this assertion petitioner quotes Millis and Montgomery, *Organized Labor* (1945), p. 554. One passage quoted by petitioner, with petitioner's deletions restored and italicized, is as follows:

> "In exerting pressure upon employers to recognize them and to accept their demands, unions, *provided*

---

[3] Section 8(d) provides that the obligation to bargain collectively "does not compel either party to agree to a proposal or require the making of a concession."

> *argument is unsuccessful,* resort to the strike, *the boycott, and possibly violence and sabotage.* The employers resort to corresponding methods—the lockout, *the black list, and violence.*"

It is quite evident, once the deletions are restored, that Millis and Montgomery were describing the weapons actually used by unions and employers, but with no inference that they were "well recognized and accepted."

3. The question remains whether a broad right to lockout employees during collective bargaining, as a means of putting pressure on them to accept the employer's terms, should be accorded to employers to achieve "the balancing of conflicting legitimate interests." (*NLRB* v. *Truck Drivers Local 449*, 353 U.S. 87, 96.) In other words, whether employers should be accorded this right in order to give them additional bargaining strength, as the Board put it, "to force the abandonment of the union's contract demands and the acceptance of the employer's."

More precisely, the question is whether the Board's conclusion, that the balancing of interests between employers and employees does not require that employers be permitted to use the lockout as an offensive weapon during collective bargaining, is so unreasonable as to exceed the considerable discretion vested in the Board to make determinations of this sort. *NLRB* v. *Truck Drivers Local 449*, 353 U.S. at 96-97; *NLRB* v. *Erie Resistor Corp.*, 373 U.S. 221, 236-237.

As has been shown, the use of the lockout here in issue is, as the Board held, a literal violation of § 8(a)(1) and (3) of the Act. In view of *Truck Drivers Local 449*, and of *Mackay*, we presumably must nevertheless concede that the Board could permit the lockout as an offensive weapon in collective bargaining, if it reasonably concluded that employers should be accorded such a right to achieve an

over-all balancing of conflicting interests.[4] However, the Board has not reached that conclusion, but the opposite one.

It is our position that the NLRB, by its interrelated doctrines as to what measures of self-help employers may and may not use, and in what circumstances they may use them, in labor disputes over economic issues, including its ruling against use of the lockout as an offensive weapon in ordinary circumstances, "has legitimately balanced conflicting interests" *(Truck Drivers Local 449,* 353 U.S. at 648), if indeed its doctrines are not overbalanced in favor of employers.

Let us briefly review these doctrines.

To begin with, as stated earlier, an employer has the right to resist a strike by continuing to operate, using supervisors and/or strikebreakers. He is even free to replace strikers permanently with strikebreakers, *NLRB* v. *Mackay R. & Tel. Co.,* 304 U.S. 333, though he may not accord superseniority to the latter. *NLRB* v. *Erie Resistor Corp.,* 373 U.S. 221.

The employer's right to self-help against a strike also includes, of course, the right to close a struck plant. On the other hand, the Board has consistently taken the view that ordinarily an employer who has not been struck may not shut down operations, and lock out his employees, during collective bargaining, in order to put pressure on them to accept his terms. To this general doctrine the Board

---

[4] But cf. *NLRB* v. *Insurance Agents Int. Union,* 361 U.S. 477. Section 1 of the NLRA declares:

> "Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce • • • by restoring equality of bargaining power between employers and employees."

The Act contains no expression of concern about equalizing employer bargaining power.

has, however, recognized two exceptions; i.e., it has held that in two situations an employer is entitled to shut down his operation in advance of a threatened strike as a defensive measure.

One situation in which a lockout is held to be permissible as a defensive measure is when an unscheduled shutdown would be unusually injurious because of special circumstances. Thus the Board has sanctioned defensive shutdowns where it has found that a threatened strike could result in spoilage of inventory *(Duluth Bottling Assn.,* 48 NLRB 1335), the tieing up of customers' cars (*Betts Cadillac Olds, Inc.,* 96 NLRB 268), and inconvenience and danger to the public from a sudden tie-up of road and bridge construction *(Bldg. Contractors Assn.,* 138 NLRB 1405). As this Court put it in *Truck Drivers Local 449,* 353 U.S. at 97, the Board "has legitimately balanced conflicting interests by permitting lockouts where economic hardship was shown."

The Board has also held, and this Court sustained its decision, that all of the members of a multi-employer bargaining unit might shut down when the union struck one member. As this Court put it in that case, *Local 449,* 353 U.S. at 93:

> "The narrow question to be decided is whether a temporary lockout may lawfully be used as a defense to a union strike tactic which threatens the destruction of the employers' interest in bargaining on a group basis."

The Court's rationale, in upholding the Board, was (p. 96):

> "Although the Act protects the right of the employees to strike in support of their demands, this protection is not so absolute as to deny self-help by employers when legitimate interests of employees and employers collide. Conflict may arise, for example, between the right to strike and the interest of small employers in preserving multi-employer bargaining as a means of bar-

> gaining on an equal basis with a large union and avoiding the competitive disadvantages resulting from nonuniform contractual terms. The ultimate problem is the balancing of the conflicting legitimate interests. The function of striking that balance to effectuate national labor policy is often a difficult and delicate responsibility, which the Congress committed primarily to the National Labor Relations Board, subject to limited judicial review." (Citations omitted.)

An alternative and simpler rationale is that a multi-employer unit should be treated as a single employer, not merely for collective bargaining but for determining the permissible responses to a strike. Under that rationale the employers could shut down the entire multi-employer unit if any part of it were struck, and could replace strikers *(Mackay)*, but could not replace, either temporarily or permanently, employees who do not go on strike. A single employer, part of whose operation is struck, may not replace employees who do not strike, and there is no reason, pragmatic or theoretical, for according any wider right to replace to employers in a multi-employer unit.[5]

In any event, we submit that these interrelated NLRB doctrines as to employer self-help during a strike over economic issues are certainly not unreasonably weighted against employers, if, indeed, they do not unduly favor them.

In view of their much greater financial resources,[6] employers are far better able to wait out a strike than are

---

[5] The issue of temporary replacement of employees, in a multi-employer unit, who did not go on strike, is before the Court in *NLRB* v. *Brown*, No. 7, October Term, 1964, set for argument with this case.

[6] According to BLS Report No. 237-38 (April 1964) the average income after taxes for skilled workers is $6,664; for semi-skilled is $5,681; and for unskilled is $4,330. The 1963 Survey of Consumer Finances by the Survey Research Center, University of Michigan (Ann Arbor) shows that the median total liquid asset holdings in early 1963 were $255 for a "spending unit" (*i.e.*, fam-

employees. But employers need not wait out a strike: under the Court's dictum in *Mackay,* which the Board has followed, employers have the legal right to hire strikebreakers. In situations where it is practicable for employers to exercise that right, Board doctrine does not achieve any "balancing of conflicting legitimate interests." The supposed rights of the employees to bargain collectively and to strike are wholly subordinated to the right of the employer to operate his business. As Professor Meltzer, a defender of the lockout, or at least of the right to lockout, has observed:

> "* * * where the right to replace can be and is exercised, its exercise generally poses a more serious threat to industrial peace than does a lockout; the prospect of replacements constitutes, moreover, a more effective restraint on concerted activities than does the lockout." [7]

Petitioner, and Professor Meltzer too, argue in effect, that since strikebreaking, which is a more potent weapon than the lockout and more flagrantly violative of employee rights under the Act, has been sanctioned, so should the lockout be. But it does not follow that poison gas should be legalized because atomic weapons have not been banned.

We submit that the optimum result would be for the Court to reverse its *Mackay* dictum, and ban strikebreaking. If an employer cannot agree on terms and conditions of employment with his own employees, and an impasse is reached in negotiations, an employer should have the

---

ily) having income of $5000-$6000; $465 for a unit having income of $6000-$7500; and $880 for a unit having income of $7500-$10,000 (p. 99, table 6-2). During the same period, 60% of the spending units in the $5000-$7500 bracket owed installment debt (*i.e.*, excluding mortgage debt), the median amount of debt being $455; and 63% of the units in the $7500-$10,000 bracket owed installment debt, the median amount being $785. (p. 66).

[7] Meltzer, *Lockouts Under the LMRA: New Shadows on an Old Terrain*, 28 U. Chic. L. Rev. 614, 617.

right to put his own proposals into effect, but he should not have the right to replace employees who reject them and go on strike.

Such a rule would more nearly equalize economic strength, though employers would still usually have the advantage. It would obviate strike violence.[8] It would forbid, instead of sanctioning, discrimination against employees for engaging in concerted activities supposedly protected by the Act.

If strikebreaking were banned, then it could be argued, as pointed out earlier, that the lockout was indeed the corollary of the strike. For if strikebreaking were banned the right to strike would be the right to shut the operation down, and that is what the right to lockout is. Even then the questions would remain (1) whether according employers the right to lockout would achieve a reasonable balancing of interests, and (2) whether employers have any legitimate need for the lockout, absent special circumstances, in view of their right to put their proposals into effect if an impasse is reached. However, if strikebreaking were banned the strike and the lockout would then at least have the same legal and practical effect, i.e., to shut down the plant. At present the right to strike is only the right to stop work, at risk of replacement, not the right to stop the operation; and the lockout is in no sense a corollary right.

If, however, the Court feels that it is too late to overturn *Mackay* now, after the Taft-Hartley and Landrum-Griffin revisions of the NLRA, the approach the Court used

---

[8] Petitioner states (Br. p. 11, fn. 3), "Actually, replacement of strikers and attempts to operate a plant with strikebreakers may well lead to violence * * *" Millis and Montgomery (p. 669) are in accord.

in *Erie Resistor* becomes applicable here, *viz.*, (373 U.S. at 232):

> "We have no intention of questioning the continuing vitality of the Mackay rule, but we are not prepared to extend it to the situation we have here."

We have shown, we submit, that the Board's present rules on self-help are tilted in favor of employers. But we need not show that. This Court has repeatedly and recently held that the Board has wide discretion in striking a reasonable balance, and certainly no case can be made that its rules are inordinately adverse to employers.

It would of course increase the strength of employers relative to unions in collective bargaining to accord to employers the right to use the lockout as an offensive weapon in bargaining. That, frankly, is one reason we are opposed to it. The other reason is that it would greatly increase the number of shutdowns and the amount of industrial strife.

The right to use the lockout as an offensive weapon in bargaining would strengthen employers and weaken unions in two ways. In the first place it would give employers a greater measure of control over the timing of a shutdown. Control of timing is of course of major importance in an economic test of strength. An employer always has the right to shut down for economic reasons,[9] but if an employer can also use a shut down during slack season as a weapon to induce acceptance of his contract proposals his bargaining strength is greatly augmented. Conversely, a strike during an employer's busy season is a more powerful weapon than a strike during the slack season; and employees may be especially reluctant to strike at certain times of year, such as the Christmas season. The proce-

---

[9] However, an increasing number of collective bargaining agreements provide for payment of supplemental unemployment benefits by employers.

dural requirements of § 8(d) would of course have to be met by employers resorting to lockout, as by unions resorting to strike, but, depending on contract reopening provisions and expiration dates, great flexibility as to the timing would remain.

Just how much flexibility would depend on whether the rule adopted allowed the employer to use the lockout as an offensive weapon in bargaining only after an impasse was reached—the situation here—or allowed use of the lockout at any time so long as the procedural requirements of § 8(d) had been met. Since the union is free to strike at any time, once it has complied with § 8(d), and need not await impasse,[10] it might follow, if the lockout were held to be the corollary of the strike, that the employer was similarly free as respects the timing of the lockout. That would give employers a powerful weapon indeed.

To meet this threat of a lockout timed to the employer's interests and convenience, unions would often be compelled to strike prematurely, at a time when the strike would have maximum impact on the employer or minimum detriment to the employees, without waiting to see whether agreement could be reached without a strike. Since agreements are reached without a shutdown in more than 98% of contract renegotiations,[11] such a development would be most unfortunate.

The other reason why legalizing the lockout would cause more shutdowns is that employers would sometimes likewise resort to lockout in situations where agreement could have been reached without a shutdown. There is, of course, a large element of bluff in collective bargaining negotiations, and unions often threaten to strike, take strike votes,

---

[10] *NLRB* v. *Insurance Agents' Int. Union*, 361 U.S. 477, 491.
[11] U.S. Dept. of Labor, Analysis of Work Stoppages 1963, Bulletin No. 1420, Oct. 1963, p. 2.

etc., without actually expecting to strike. Thus if employers were free to lockout, they would, in order to get the advantage of timing, inevitably shut down in many situations where no strike would have eventuated.

When there is added the likelihood, discussed above, that if employers were free to lockout unions would be quicker to strike in order to retain control of the timing of the shutdown, the over-all results of sanctioning the lockout would be a greatly increased number of shutdowns and sharply augmented industrial strife.

III

The Lockout is not the Corollary of the Strike as Respects the Language or Over-all Plan of the Act

From the standpoint of their respective legality or illegality, the strike and the lockout have never been corollary.

At common law the lockout occupied a preferred legal position to the strike. Petitioner states (Br. p. 13):

> "Prior to the Wagner Act the lockout was practiced without legal restriction by single employers or voluntary associations of interested employers."

This assertion, which is correct, is evidently taken from Millis and Montgomery (p. 555):

> "At common law the lockout may be practiced without legal restriction, whether by a single employer or by a voluntary association of employers directly interested."

Millis and Montgomery go on to point out that (p. 556) "the courts in applying the common law have placed limitations upon strikes not placed upon lockouts." Those limitations are detailed at length, pp. 556-566.

The Wagner Act (1935-1947) reversed the situation, for under it the strike occupied a preferred legal position to the lockout. In the Wagner Act "Congress safeguarded

the exercise by employees of 'concerted activities' and expressly recognized the right to strike." *International Union, Etc.* v. *O'Brien*, 339 U.S. 454, 457.[12] While some strike activities were beyond the protections of the Act,[13] none were forbidden by it, since the Act dealt only with employer, and not union, unfair labor practices. In contrast, while the Wagner Act contained no specific references to the lockout, the general provisions of §§ 7 and 8, which were carried over into Taft-Hartley, unquestionably rendered the lockout illegal in some circumstances, *i.e.* when used to undermine the union, or to evade the duty to bargain. See *Truck Drivers Local 449*, 353 U.S. at 93.

The Board doctrine, also referred to with apparent approval in *Local 449* (p. 97), permitting lockouts in situations involving especial economic hardship, likewise goes back to the Wagner Act period. In *Duluth Bottling Assn.*, 48 NLRB 1335 (1943), the Board upheld a lockout on the grounds that (p. 1336):

> "[N]ot only were the respondents motivated entirely by a desire to avoid the peculiar economic loss which would have been a fortuitous incident of a strike, but that the lock-out was intended merely to synchronize with, and not precipitate, economic conflict. We therefore find, as did the Trial Examiner, that the closing of the plants was not intended to interfere with or discourage union activity or to minimize the effectiveness of the Brewery Union's economic weapons, but was intended solely to protect the respondents' property and was therefore not in violation of the Act."

Thus, while under the Wagner Act the Board permitted the lockout in situations of peculiar economic hardship, the Board even then regarded the lockout as violative of the

---

[12] The Court cited §§ 7, 2(3) and 13.

[13] See e.g., *NLRB* v. *Fansteel Metallurgical Corp.*, 306 U.S. 240.

Act if used as an offensive weapon in collective bargaining.

At any rate, the strike and the lockout clearly were not the legal corollaries of one another under the Wagner Act. The right to strike was in general protected by that Act, and never forbidden, while the lockout was proscribed except as a defensive measure against unusual economic loss.

While the Taft-Hartley Act added to the Wagner Act a number of restrictions on the right to strike, and also certain specific references to the lockout, it did not, we submit, basically alter the approach of the Wagner Act (and the common law too) of treating separately the legality of strikes and lockouts. With the single exception of the 60-day notice requirements of § 8(d), Taft-Hartley does not deal with the legality of the strike and the lockout together, or in parallel provisions, any more than did the Wagner Act. Let us examine the Taft-Hartley provisions.

Section 501(2) of the Taft-Hartley Act defines the term "strike" as used in all titles of the Act. Section 13 of the National Labor Relations Act, which is Title I of Taft-Hartley provides:

> "Nothing in this Act, *except as specifically provided for herein*, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, *or to affect the limitations or qualifications on that right.*"

The italicized provisions were added by Taft-Hartley to the existing Wagner Act provision. The reason for the additions was, of course, that while the Taft-Hartley Act preserved, in general, the right to strike, including in particular the right to strike over economic issues, it did place several specific restrictions on the right to strike.

Some of the Taft-Hartley provisions restricting the right to strike use the term "strike." See, *e.g.*, §§ 8(b)(4(i) and 8(d)(4). Other provisions, such as §§ 8(b)(1), (2) and (6),

while not using the term "strike," unquestionably do prohibit strikes having certain enumerated proscribed objects or effects.

Thus the over-all scheme of the Act is that the term "strike" is defined, and the right to strike is explicitly preserved, except as otherwise specifically provided.

The Act does not contain any provisions with respect to the lockout which even remotely parallel these provisions as to the strike. It contains no definition of the term "lockout" and no general provision that the lockout is either legal or illegal. It contains no provision comparable to § 9(b)(4)(i) explicitly making it an unfair labor practice for an employer to lockout for a proscribed object.

The general provisions of §§ 7 and 8(a), carried over into Taft-Hartley from the Wagner Act, do continue to, at the least, proscribe certain uses of the lockout, *e.g.*:

> "to frustrate organizational efforts, to destroy or undermine bargaining representation, or to evade the duty to bargain." *Truck Drivers Local 449*, 353 U.S. at 93.

But while the general provisions of § 8(a) do forbid certain uses of the lockout, just as the general provisions of § 8(b) do forbid certain uses of the strike, the provisions are for the most part not parallel, and the proscribed uses are not the same ones. The banned uses of the lockout by employers for the most part have no strike counterparts, just as the banned uses of the strike for the most part have no lockout counterparts.

The only provision in the NLRA, *i.e.*, Title I of Taft-Hartley, which couples the strike and the lockout is § 8(d)(4) and that provision does not deal with the substantive legality of the strike or lockout, but simply prescribes certain notices. Specifically, § 8(d) defines the duty "to bargain collectively" and its subsections, includ-

ing (4) require that certain notices be given when a collective bargaining agreement is in effect before a party is permitted to resort "to strike or lockout" to secure a new or modified contract. Thus § 8(d)(4) is purely procedural. It does not make either strikes or lockouts for particular purposes either legal or illegal, nor does it carry any connotation that the one shall be legal when the other is. The most that can be said of § 8(d)(4) is that is that it assumes that lockouts may sometimes be legal. It "is statutory recognition that there are circumstances in which employers may lawfully resort to the lockout as an economic weapon." *(Truck Drivers Local 449,* 353 U.S. at 92-93.)

Strikes and lockouts are also coupled in several provisions in Title II, but again without regard to their substantive legality under Title I, and without any implications that the legality of the one depends on the legality of the other.

The first of these couplings of strike and lockout is in § 203. It simply states that the Director of the Federal Mediation and Conciliation Service shall seek to induce the parties to a labor dispute to settle the dispute "without resort to strike, lock-out, or other coercion."

There are also three separate references to "strike or lock-out" in the provisions dealing with "national emergencies," *e.g.*, §§ 206 and 208. These national emergency provisions may of course be invoked quite independently of whether the strike or lockout is legal or illegal under Title I, and thus have no relevance to the question here in issue.

It is thus quite clear that the lockout is not the corollary of the strike as respects their legality under the Taft-Hartley Act, with the single, and for this case irrelevant, exception of the notice requirement of § 8(d)(4). Under Taft-Hartley, the legality of strikes and lockouts are deter-

mined quite independently, just as under the Wagner Act and at common law.

Conclusion

For the foregoing reasons the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

J. Albert Woll
General Counsel, AFL-CIO
Robert C. Mayer
Theodore J. St. Antoine
736 Bowen Building
815 Fifteenth Street, N. W.
Washington, D.C. 20005
Thomas E. Harris
Associate General Counsel, AFL-CIO
815 Sixteenth Street, N. W.
Washington, D.C. 20006

December 1964